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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1314

LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, and
BERT J. HEUSER - - - - - - Petitioners

vs.

GEORGE BURTON, Director of Public Safety, and
LOUISVILLE CIVIL SERVICE BOARD - Respondents

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

MANNY H. FROCKT
STEPHEN S. FROCKT
RICHARD FROCKT
FROCKT & BENOVITZ
1417 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Petitioners

WESTERFIELD-SCOTT CO., INC., 630 W. KENTUCKY, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

No. _____

LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, and
BERT J. HEUSER - - - - - *Petitioners*

v.

GEORGE BURTON, Director of Public Safety, and
LOUISVILLE CIVIL SERVICE BOARD - *Respondents*

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The Petitioners, Louisville Lodge No. 6, Fraternal Order of Police, and Bert J. Heuser, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the Kentucky Court of Appeals entered in this proceeding on the 31st day of January, 1975.

OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at 518 S. W. 2d 777 (1975).

JURISDICTION

The date of the entry of the judgment sought to be reviewed is January 31, 1975. A mandate of the Kentucky Court of Appeals of March 4, 1975 affirmed the original decision, and this Petition for Certiorari

was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1257 (3).

QUESTIONS PRESENTED

1. Whether Kentucky Revised Statutes 90.220 (2) prohibits a police officer employed by a city of the first-class from becoming a candidate for the office of Alderman on the Board of Aldermen of a city of a first-class?
2. Whether the actions of the City of Louisville Chief of Police in suspending the Petitioner, Bert J. Heuser, because he became a candidate for the office of Alderman was arbitrary, capricious, and a violation of his rights under the Constitution of the United States or under other laws?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Civil Service Rule II, Section 4, states as follows:

"POLITICAL ACTIVITY (Amendment Number XXI, Adopted 9 August 1962) Persons holding positions in the classified service shall not be discriminated against in any way because of their political or religious opinions or affiliations or because of their exercise of their right to vote as they please.

"No person in the classified service, nor any person on leave of absence from a position in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of

Police, Assistant Chief of Police, Chief of Firemen, nor Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit any assessment, subscription or contribution, to or for any political party, or any candidate for public office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee, or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters; or in any manner be concerned therewith, provided, however, that nothing herein shall prevent any such person from freely expressing his or her views as a citizen or from casting his or her vote in any election.

"Any person who shall violate this section shall be summarily dismissed from the service by the appointing authority (or, if a member of the Board, by the Mayor) and may not be employed in any service of the City, classified or unclassified, for a period of one year next thereafter; provided, however, that should the appointing authority fail or refuse to so dismiss, the Board (except when a member thereof is charged with violation of this section) shall conduct a hearing, which the accused person may attend with counsel. If the Board finds the accused guilty of violation of this section, the Board shall dismiss such violator, with the consequent disqualification. Such action of the Board is final."

The Kentucky Statutes here involved are as follows:

Kentucky Revised Statutes 90.220 (2) states:

"No person in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of Policemen, Assistant Chief of Policemen, Chief of Firemen, Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit, any assessment, subscription, or contribution, to or for any political party or any candidate for public office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters, provided, however, nothing herein shall prevent any such person from freely expressing his or her views as a citizen or to cast his or her vote in any election."

Kentucky Revised Statutes 95.015 states:

"Members of the police and fire departments in cities shall abide by and adhere to the rules, regulations and laws set forth by the Kentucky Revised Statutes, and the legislative body of the city in which they are employed, provided that no such rule, regulation or law shall apply that alters, abridges or otherwise restricts the constitutional rights of said members and said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside."

The Constitutional provision here involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is set out as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Bert J. Heuser (herein referred to as "Heuser"), was a policeman employed by the Louisville Division of Police and is a member of Petitioner, Louisville Lodge No. 6, Fraternal Order of Police. He filed as a candidate for the office of Alderman of the City of Louisville in a Democratic Party primary. When Heuser refused to withdraw as a candidate, the Office of the Louisville Chief of Police suspended him from duty on the grounds that he was in violation of Kentucky Revised Statutes 90.220 and Rule II, Section 4 of the Rules and Regulations of the Louisville Civil Service Board. Heuser's suspension was approved by the Director of Public Safety on April 29, 1971. An appeal was taken to the Louisville Civil Service Board which refused to act on the matter, and the lawsuit herein was commenced. On May 12, 1971,

the Trial Court issued an opinion in favor of the Respondents (Appendix, pp. 13-19). On January 31, 1975, the Kentucky Court of Appeals issued an opinion affirming the judgment of the lower Court (Appendix, pp. 21-24).

ARGUMENT

I. Kentucky Revised Statutes 90.220 (2) Does Not Prohibit a Police Officer Employed by a City of the First-Class From Becoming a Candidate for the Office of Alderman on the Board of Aldermen of a City of the First-Class.

Kentucky Revised Statutes Chapter 90, enacted in 1942, provided for the creation of a Civil Service Board, the employment of a personnel director, rules and regulations for classification and promotion, eligibility list, appointments, dismissals and demotions, and included a section entitled, "90.220, Political activity prohibited, penalty." The legislature therein enumerated the activities it saw fit to prohibit, but made no mention of prohibition from being a candidate for office.

The purpose of civil service laws historically arose out of an attempt to thwart the "spoils system". Civil service is supposed to apply based upon the applicant's ability and theoretically to eliminate as far as practicable the elements of partisanship and personal favoritism. While Chapter 90 recites no intent as to what the legislators had in mind in creating the city civil service, Petitioners contend that the purpose of Chapter 90 was: (1) to free the municipal employee from

partisan politics and (2) to give the people more efficient service. It was not intended to cover the specific situation of a civil servant running for office but was designed to protect such employee from making financial contributions to a party or a candidate.

To construe the Statute to include a prohibition of becoming a candidate would be to add to the very specific enumerations of political activities prohibited. The construction of the Statute is governed by the ancient legal maximum "expressio unius est exclusio alterius"—meaning that the expression of one thing is the exclusion of another.

This doctrine was incorporated into Kentucky law in *Burgin* v. *Forbes,* 293 Ky. 456, 169 S. W. 2d 321 (1943). In the instant case, the legislature has specifically enumerated in detail various activities, which come within the general category of political activities, which are prohibited to persons in the classified service. These include, among other things, prohibitions against giving, soliciting, receiving, or remitting any assessment, subscription or contribution to or for a political party or candidate, and against being a member of a campaign committee or an election officer or a worker at the polls on election day.

The obvious intent of these prohibitions is to insulate employees in the classified service from pressure from their superiors and from candidates who may become their superiors to assist them in their campaigns. The legislators, all of whom were elected, knew very well the nature of a political campaign and knew very well precisely what activities they wished em-

ployees of cities to refrain from. The legislature spoke with precision.

By precluding a city employee, such as the Plaintiff, from becoming a candidate for office, one does not combat the evil sought to be eradicated by this Statute—namely, the spoils system of political patronage.

In *City of Miami* v. *Sterbenz,* Fla., 203 So. 2d 4 (1967), the Supreme Court of Florida was faced with a statute very similar to Kentucky Revised Statutes 90.220 (and Civil Service Rule II, Section 4). In that case, the state statute and the city ordinance provided as follows:

> "No officer or employee of the city shall directly or indirectly solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or any political purpose whatever. No person holding position in the classified service shall take part in political management or affairs or in political campaigns further than to cast his vote or express privately his opinion" (at p. 5).

There, the court held:

> "We here simply hold that the particular language of the court and statute is not sufficiently definitive to effect a prohibition against candidacy for public office by an employee in the classified service. A reasonably specific statute may well produce a different result." (at p. 6)

Likewise, in the instant case, Kentucky Revised Statutes 90.220 is not sufficiently definitive to prohibit

an employee from becoming a candidate for public office.

In *Kinnear* v. *City and County of San Francisco,* 38 Calif. Reporter 631 (1964), the plaintiff was employed by the defendant as a deputy sheriff. The plaintiff filed as a candidate for the office of Sheriff and was on the same date dismissed for violation of a rule of city government which provided that any appointed officer or employee who became a candidate for election to a public office shall automatically forfeit his position. The Court found for the plaintiff stating such a rule as being an unconstitutional abridgment of fundamental rights.

With reference to interpretation as to whether Kentucky Revised Statutes 90.220 is to be extended so as to prohibit a public servant from running for office, we contend that the U. S. Supreme Court has placed upon the state the burden of showing that a compelling reason is present and that the statute requires that the restriction must be drawn with narrow specificity. *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 329, 9 L. Ed. 2d 405 (1963).

The Kentucky Court of Appeals, in its decision, stated:

> "This Court is of the opinion that the implication in KRS 90.220(2) of the prohibition against candidacy is so obvious that the prohibition may be considered to be expressed in plain and understandable language . . . " (Appendix, p. 24).

The Petitioners argue that the Kentucky Statute in question is not definitive in any regard to support

the decision of the Kentucky Court of Appeals, and therefore, was arbitrary and deprived Heuser of his rights guaranteed by the Fourteenth Amendment to the United States Constitution.

II. The Actions of the City of Louisville Chief of Police in Suspending the Petitioner, Bert J. Heuser, Because He Became a Candidate for the Office of Alderman Was Arbitrary, Capricious, and a Violation of His Rights Under the Constitution of the United States and Under Other Laws.

We now arrive as to whether the actions of the Chief of Police in following the Rules and Regulations of the Louisville Civil Service Board and the Kentucky Revised Statutes were constitutionally correct and whether or not the legislature can politically sterlize public service employees to the point where said employees must forfeit their rights as a civil servant by filing for public office. The First Amendment of the United States Constitution includes the freedom from having government placing unconstitutional prerequisites upon public employees as a condition of continued employment.

In *Minielly* v. *State of Oregon*, 411 P. 2d 69 (1966), plaintiff was a deputy sheriff who announced his intention to become a candidate for sheriff. He was told, as was Heuser here, that if he did so he would violate a state statute and would automatically forfeit his civil service position. Plaintiff argued that such a state statute violated his constitutional rights. The Court concluded that, "It must be conceded that running for public office is one of the means of political expression

which is protected by the First Amendment. The right to engage in political activity is implicit in the rights of association and free speech guaranteed by the amendment." (at p. 73) The Court went on to cite the case of *Lamont* v. *Postmaster General,* 85 S. Ct. 1493 (1965), which states, ". . . the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful." (at p. 1497)

The right to associate for the advancement of political beliefs is, of course, one of our "most precious freedoms" and is protected by the First Amendment. *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *NAACP* v. *Button, supra.*

In *Fort* v. *Civil Service Commission,* 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P. 2d 385 (1964), the Court held unconstitutional a section of a county charter prohibiting Civil Service employees from taking part in political management or affairs in any political campaign or election, as conflicting with the First Amendment. In the companion case of *Kinnear* v. *City and County of San Francisco, supra,* the Court held as too broad a provision of the county charter requiring any Civil Service employee who becomes a candidate for election to any public office to forfeit his position.

In *De Stefano* v. *Wilson,* 96 N. J. Super. 592, 233 A. 2d 682 (1967), the Superior Court of New Jersey held unconstitutional a rule of the city fire department prohibiting firemen from taking an active part in politics or political contests or engaging in controversy

concerning candidates or issues. The plaintiff ran for councilman and refused the request of the Director of Law and Public Safety that he take a leave of absence. During the campaign, he was served with charges specifying his conduct in running for office. The Court permanently enjoined the defendants from proceeding against the plaintiff, holding that the rule is overbroad. The Court there stated:

> "Plaintiff is not charged with having conducted his political campaign while on duty. Nor is he charged with neglecting his duties as a fireman or in any way subserving the responsibilities of his position to his personal political objectives." (at p. 687)

In *City of Miami* v. *Sterbenz, supra,* the Court upheld the lower court's ruling that the first provision of this statute and ordinance, that employees shall not make, solicit or receive contributions for any political purpose, or be in any manner concerned with such activity, was invalid for ambiguity, being too broad and vague to be sustained. The same is certainly true in the instant case.

In *Mancuso* v. *Taft,* 341 F. Supp. 574 (1972), a police officer became a candidate for nomination for representative to the Rhode Island General Assembly in violation of the City Charter relating to political activities of its classified civil service employees. He was faced with suspension from employment when he brought that suit for declaratory and injunctive relief. There, the city charter prohibited a city employee from "continuing in the classified service of the City after

becoming a candidate for nomination or election to any political office . . ." and required the removal of any employee violating that prohibition. The Court stated, while holding the Charter and Civil Service Rules unconstitutional, the following:

> "Involved in the present litigation are the First Amendment rights of government employees to freedom of expression, freedom of association, and freedom of petition the government for redress of grievances. '/S/peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana,* 379 U. S. 64, 74-75 (1964). Much as the right to vote is a fundamental right, protected because it is the citizen's access to participation in the political processes of his State's legislative bodies, *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and thus the means for preservation of all other rights the right to run for public office and engage in political activity would similarly seem to warrant protection." (at p. 581)
>
> "Besides the impairment of the First Amendment rights of public employees, these ordinances act to restrict the rights of the voters of Cranston. Section 14.09(c) in particular tends to limit the field of candidates from whom voters might choose. Section (c) penalizes the prospective candidate by requiring him to resign from government employment before running for nomination or for office. To the affluent candidate or the candidate with affluent supporters, this penalty effect will not foreclose the candidacy. But to the less affluent candidate who draws his supporters from the less affluent segment of the community, the penalty may well foreclose his candidacy." (at p. 581)

> "While it may be permissible to restrict political activities such as using official authority for partisan political purposes, political coercion of subordinates, or non-compliance with the merit system in promotion, the shot-gun approach taken here is impermissible." (at p. 582)

Recently, in *National Association of Letter Carriers* v. *U. S. Civil Service Commission,* 346 F. Supp. 578 (1972), a three Judge U. S. court held that the Hatch Act's prohibition against federal employees taking "active part in political management or in political campaigns" is unconstitutionally vague, overly broad, and chills First Amendment rights.

Therefore, if decision herein stands, it prohibits Heuser from becoming a candidate for the office of Alderman, which we contend is unconstitutional.

Finally, Kentucky Revised Statutes 95.015, in part, provides:

> "No such rule, regulation or law which apply that alters, abridges or otherwise restricts the constitutional rights of said members and said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside."

Civil Service Regulation II, Section 4, which attempts to restrict the rights of employees in the classified service from engaging in political activity, to-wit: running for public office, is in derogation to KRS 95.015 and is repugnant to the Fourteenth Amendment

of the United States Constitution in that in this instant case the Louisville Civil Service Board refused to grant a due process hearing to the Petitioner upon his refusal to withdraw as a candidate for public office. See *Mancuso* v. *Taft, supra.*

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

MANNY H. FROCKT
STEPHEN S. FROCKT
RICHARD FROCKT
FROCKT & BENOVITZ
1417 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Petitioners

УЬЬЕИDIК

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FOURTH DIVISION

No. 149271

LOUISVILLE LODGE No. 6, FRATERNAL ORDER OF POLICE, Et Al. - - - - - - - *Plaintiffs*

v.

GEORGE BURTON, Et Al. - - - - *Defendants*

OPINION

This action was brought by the plaintiffs who allege that plaintiff, Bert J. Heuser, was arbitrary and capriciously suspended from his employment as a police officer because he refused to withdraw as candidate for the office of an alderman in the forthcoming Democratic primary in the City of Louisville. Plaintiffs ask the Court for a declaration of rights.

Oral argument was held on May 6, 1971 and the parties are all agreed that there is no genuine issue of fact and that the only question the Court must decide is whether or not the Chief of Police is justified in suspending the plaintiff because of his candidacy for the office of alderman.

KRS 90.220(2) states as follows:

> "No person in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of Policemen, Assistant Chief of Policemen, Chief of Firemen, Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit, any assessment, subscription, or contribution, to or for any political party or any candidate for public

office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters, provided, however, nothing herein shall prevent any such person from freely expressing his or her views as a citizen or to cast his or her vote in any election."

A later statute, KRS 95.015 provides as follows:

"Members of the police and fire departments in cities shall abide by and adhere to the rules, regulations and laws set forth by the Kentucky Revised Statutes, and the legislative body of the city in which they are employed, provided that no such rule, regulation or law shall apply that alters, abridges or otherwise restricts the constitutional rights of said members and said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside."

Civil Service Rule II, Section 4 states as follows:

"Political Activity (Amendment Number XXI, Adopted 9 August 1962) Persons holding positions in the classified service shall not be discriminated against in any way because of their political or religious opinions or affiliations or because of their exercise of their right to vote as they please.

No person in the classified service, nor any person on leave of absence from a position in the classified service, and neither the Personnel Director nor any mem-

ber of the Board, nor the Chief of Police, Assistant Chief of Police, Chief of Firemen, nor Assistant Chief of Fireman, shall directly or indirectly, give, solicit, receive, or remit any assessment, subscription or contribution, to or for any political party, or any candidate for public office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee, or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters; or in any manner be concerned therewith, provided, however, that nothing herein shall prevent any such person from freely expressing his or her views as a citizen or from casting his or her vote in any election.

Any person who shall violate this section shall be summarily dismissed from the service by the appointing authority, (or, if a member of the Board, by the Mayor,) and may not be employed in any service of the City, classified or unclassified, for a period of one year next thereafter; provided, however, that should the appointing authority fail or refuse to so dismiss, the Board (except when a member thereof is charged with violation of this section) shall conduct a hearing, which the accused person may attend with counsel. If the Board finds the accused guilty of violation of this section, the Board shall dismiss such violator, with the consequent disqualification. Such action of the Board is final."

Examining first KRS 90.220, Section 1 to determine from its language the intent of the legislature, we see that the statute explicitly prohibits the giving or receiving, soliciting or remitting of any assessment, subscription, or con-

tribution to or for any political party or any candidate for political office. These words are very positive and indicate the legislature's strong intent to keep the person named in the statute from being involved in any way in the passing of any money for political purposes. This interpretation is reinforced by the use of the words "or in any manner be concerned therewith" which follows immediately upon the prohibition against giving and receiving contributions.

The Court takes judicial notice of the fact that each candidate for political office must post a filing fee of $1. See KRS 119.250. Furthermore, every candidate for political office who has any asperation of succeeding must expect that some money will be expended on his behalf. If successful in the primary race, he can expect that his political party will call upon his for a direct financial contribution to the party. The Court has been in three political elections and will take notice of the fact that practically every candidate engages in the practice of passing out cards with his name and the office which he seeks on them. This, of course, requires the expenditure of funds for a political purpose.

It is true that the legislature did not include in the statute the words "nor shall any such person be a candidate for office." However, in the second part of this statute there follows another list of prohibitions which prevent the persons in the Civil Service from being members of any campaign committee, or governing committee of a political organization, and further prohibits being an officer in such an organization and also prohibits working at the polls or being an election officer or prohibits them from participating in the purgation or registration of voters. These prohibitions again indicate strongly that the legislative intent to disassociate Civil Service employees from any form of political activities.

It is true that the last part of KRS 90.220 (1) provides that nothing shall prevent anyone in the Civil Service from

freely expressing his or her views as a citizens or casting his or her vote in an election but nothing is said impowering such persons to express their views as a candidate.

It is a well established rule of statutory construction that the power granted by statute is not limited to that which is expressly conferred but includes that which is necessarily or fairly implied in or incident to the accomplishment of the things which are expressly authorized. See *Long* v. *Mayo,* 271 Ky. 192, 111 S. W. 2d 633, and *Dodge* v. *Jefferson County Board of Education,* 298 Ky. 1, 181 S. W. 2d 406 and many other cases cited under key note 185, West Digest on Statutes, Volume 17-A. In the instant case it is very obvious that the legislature meant to accomplish what has been described as the political sterilization of public Civil Service employees. It is obvious that this purpose could not be accomplished if such employees are to become candidates for public office while so employed and to receive contributions for their candidacy and to solicit same or have others solicit for them. Therefore, the Court holds that it is necessarily implied from the words contained in the statute that the legislature intended to prohibit Civil Service employees from participating as candidates in political elections as a condition of their employment.

KRS 95.015 in effect provides that members of the Police and Fire Department shall adhere to Kentucky Revised Statutes and the ordinances of the City of Louisville which state that no such rule or law shall abridge the constitutional rights of such members and that such members except when on duty shall not be restrained from exercising their rights and privileges and enjoying endeavors enjoyed by other citizens.

At first blush this statute might tend to throw some question upon the applicability of KRS 90.220 (1) to political activities by members of the Police and Fire Depart-

ment. However, it is the belief of the Court that this section was inacted for the purpose of granting to Police and Fire Department members the right to engage in other lines of employment other than their department except when they are on duty. A suggestion was made by counsel for plaintiffs that Mr. Heuser could be a candidate 16 hours a day and a noncandidate when he was on duty. This would require Mr. Heuser and his supporters a degree of compartmentalization that simply could not be met by any human seeking office. For example, it is well known that political candidates must have political supporters and persons who are engaged in advocating their election at many different times. Any form of advertising such as billboards, radio spots, the sending of cards and other correspondence must take place often without the candidate knowing at what times and places these efforts are being exerted in his behalf.

Counsel for plaintiff has called to the Court's attention the cases of *Kinnear* v. *City of San Francisco,* 392 Pacific 2nd 391; *Minnelly* v. *Oregon,* 411 Pacific 2nd 1969; and *Fort* v. *Civil Service Commission of County of Alameda,* 61 California 2nd 331, 392 Pacific 2nd 385 as well as the annotation in 28 ALR 3rd 317, et. seq.

These cases and the annotation point out the fact that the Courts have become since 1952 when the Supreme Court decided the case of *Adler* v. *Board of Education of the City of New York,* 342 U. S. 485, 96 Law Edition 517 much more solicitous about the First Amendment rights of public employees. A very interesting summary of Supreme Court cases appears on Pages 71 through 77 of the Minnelly case, supra. The holdings in these cases indicate that statutes which curtail the First Amendment rights of public employees must be based upon a compelling State interest warranting the passage of legislation curtailing these rights. However, no mention is made in the Minnelly case or in the

annotation of the Supreme Court having overruled the case of *United Public Workers* v. *Mitchell,* 330 U. S. 75, 91 Lawyer's Edition 754, 67 Supreme Court 556 which holds that the Hatch Act prohibits the participation by Federal Civil Service employees in political activities is valid even though it curtails somewhat the freedoms of the Civil Service Employees under the First, Ninth, and Tenth Amendments. In that case it might be noted that Justice Reed pointed out that he did not find persuasive appellant's arguments that political activities during free time are not subject to regulation although political activities cannot be indulged in during working hours. His point was that people seeking political office do not lose their political hue merely because they have a job apart from the office they seek.

It is not necessary for the Court to speculate as to what the attitude of the United States Supreme Court will be in the future towards the Hatch Act should it be challenged again as an infringement upon constitutional rights. Suffice it to say that constitutionality of the statutes at issue in this action have not been challenged by the plaintiffs and, therefore, should not be decided by this Court. Students of this very interesting subject are urged to read the entire annotation at 28 ALR 3rd 717 since it contains many cases involving the question at issue.

In conclusion, the Court holds that the suspension of Mr. Heuser is not aribtrary or capricious. The City of Louisville may present a judgment in accordance with this opinion at the Motion Hour on Thursday, May 13, 1971, at 11:00 A.M.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FOURTH DIVISION

No. 149271

LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, ET AL. - - - - - - - *Plaintiffs*

v.

GEORGE BURTON, ET AL. - - - - - *Defendants*

JUDGMENT

This cause coming on to be heard on the pleadings and arguments by Counsel on May 6, 1961, and the Court being sufficiently advised;

IT IS ORDERED AND ADJUDGED:

That Bert T. Heuser the Plaintiff herein was subject to the provisions of KRS 90.220 Sub-Section 2 and KRS 95.015 and Civil Service Rule II, Section 4, which proscribes those activities in which he engaged as a candidate for the Board of Aldermen for the City of Louisville.

The suspension of this Plaintiff was not arbitrary and capricious.

This Courts opinion with its Findings of Facts and Conclusion of Law are by reference made a part hereof.

The Complaint herein is hereby dismissed.

COURT OF APPEALS OF KENTUCKY

RENDERED: JANUARY 31, 1975

No. S-182-71

LOUISVILLE LODGE No. 6, FRATERNAL ORDER OF POLICE and
BERT J. HEUSER - - - - - - - - *Appellants*

v.

GEORGE BURTON, Director of Public Safety and
LOUISVILLE CIVIL SERVICE BOARD - - - *Appellees*

Appeal from Jefferson Circuit Court
Chancery Branch, Fourth Division
Honorable Charles M. Allen, Judge
No. CA 149271

OPINION OF THE COURT BY COMMISSIONER CULLEN—AFFIRMING

This appeal presents the issue of whether KRS 90.220(2) properly and validly was construed by the circuit court as forbidding a person in the classified service of the City of Louisville from becoming a candidate for a party nomination for an elective office of the city.

Bert J. Heuser, a police officer of the City of Louisville, sought nomination in the primary as the Democratic candidate for the office of city alderman. When he refused to withdraw he was suspended by the Chief of Police for alleged violation of KRS 90.220(2). The suspension was approved by the Director of Public Safety of Louisville and by the Louisville Civil Service Board. Thereafter Heuser

and Louisville Lodge No. 6, Fraternal Order of Police, as collective bargaining representative for some 600 policemen of Louisville, brought the instant action in the circuit court seeking a declaration that the statute does not prohibit a person in the classified service from becoming a candidate for a party nomination for an elective office of the city, and a judgment restoring Heuser to his position with back pay.

The circuit court entered judgment dismissing the complaint, based on findings that the statute by necessary implication prohibited a person in the classified service from becoming a candidate for a party nomination for an elective office of the city, and a conclusion that the constitutionality of the statute was not in issue. The plaintiffs have appealed from the judgment and this court has permitted the filing of an amicus curiae brief on behalf of the Louisville Professional Firefighters Association, Local No. 345, I.A.F.F., which brief of course makes arguments in support of a reversal of the judgment.

The appellants do not in terms argue that KRS 90.220-(2) is unconstitutional. Their principal argument is that it does not prohibit a candidacy of the nature here involved. However, a part of that argument is that the statute should not be construed to make such a prohibition because such a prohibition would be unconstitutional. The brief amicus curiae directly argues that if the statute is to be so construed it is unconstitutional.

The statute is as follows:

> "No person in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of Policemen, Assistant Chief of Policemen, Chief of Firemen, Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit, any assessment, subscription, or contribution, to or for any political party or any candidate for public office, or in

> any manner be concerned therewith; nor shall any such person be a member of any campaign committee or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters; provided, however, nothing herein shall prevent any such person from freely expressing his or her views as a citizens or to cast his or her vote in any election."

Putting aside the constitutional considerations, this court agrees with the circuit court that the statute by necessary implication does prohibit a person in the classified service from becoming a candidate for a party nomination for an elective office of the city. The express words of the statute forbidding a person in the classified service from making a contribution to a candidate or in any manner being concerned with a candidate do not purport to apply only to candidates other than the person himself. This court is of the opinion that the obvious purpose of the statute to forbid partisan political activity by persons in the classified service would be frustrated if candidacy was not embraced in the prohibition.

There is a serious question, however, of whether the statute constitutionally may make such a prohibition other than in express unequivocal words. In United States Civil Service Commission v. National Association of Letter Carriers, 413 U. S. 548, the Supreme Court held that a statute *in plain and understandable language* may forbid a civil service employe from becoming a partisan candidate for, or campaigning for, an elective public office.[1] The Court in the Letter Carrier case found that the prohibitions of the Hatch Act were sufficiently clear and understandable in that

[1]This eliminated any precedential force of the holding of such cases as Minielly v. State of Oregon, Ore., 411 P. 2d 69, that a state does not have a sufficient compelling government interest to bar an employe's First Amendment right to be a candidate for a public office.

the pre-1940 rules of the Civil Service Commission, to which the Act made reference for construction, were plain and unequivocal.

This court is of the opinion that the implication in KRS 90.220(2) of the prohibition against candidacy is so obvious that the prohibition may be considered to be expressed in plain and understandable language within the requirement of the Letter Carrier case.

The judgment is affirmed.

All concur.

Attorneys for Appellants:

MANNY H. FROCKT
FROCKT & BENOVITZ, P.S.C.
Republic Building
Louisville, Kentucky 40202

Attorneys for Appellees:

JAMES E. THORNBERRY
Director of Law

JACK HANLEY
Assistant Director of Law
Room 200
City Hall
Louisville, Kentucky 40202

THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals
75 Term—January 31, 1975

LOUISVILLE LODGE #6, FRATERNAL ORDER OF POLICE and
BERT J. HEUSER

v.

GEORGE BURTON, Director of Public Safety and
LOU. CIVIL SERVICE BOARD

Appeal from a Judgment of the Jefferson Circuit Court
CA # 149271,
File # S-182-71

MANDATE

The Court being sufficiently advised, it seems there is no error in the judgment herein.

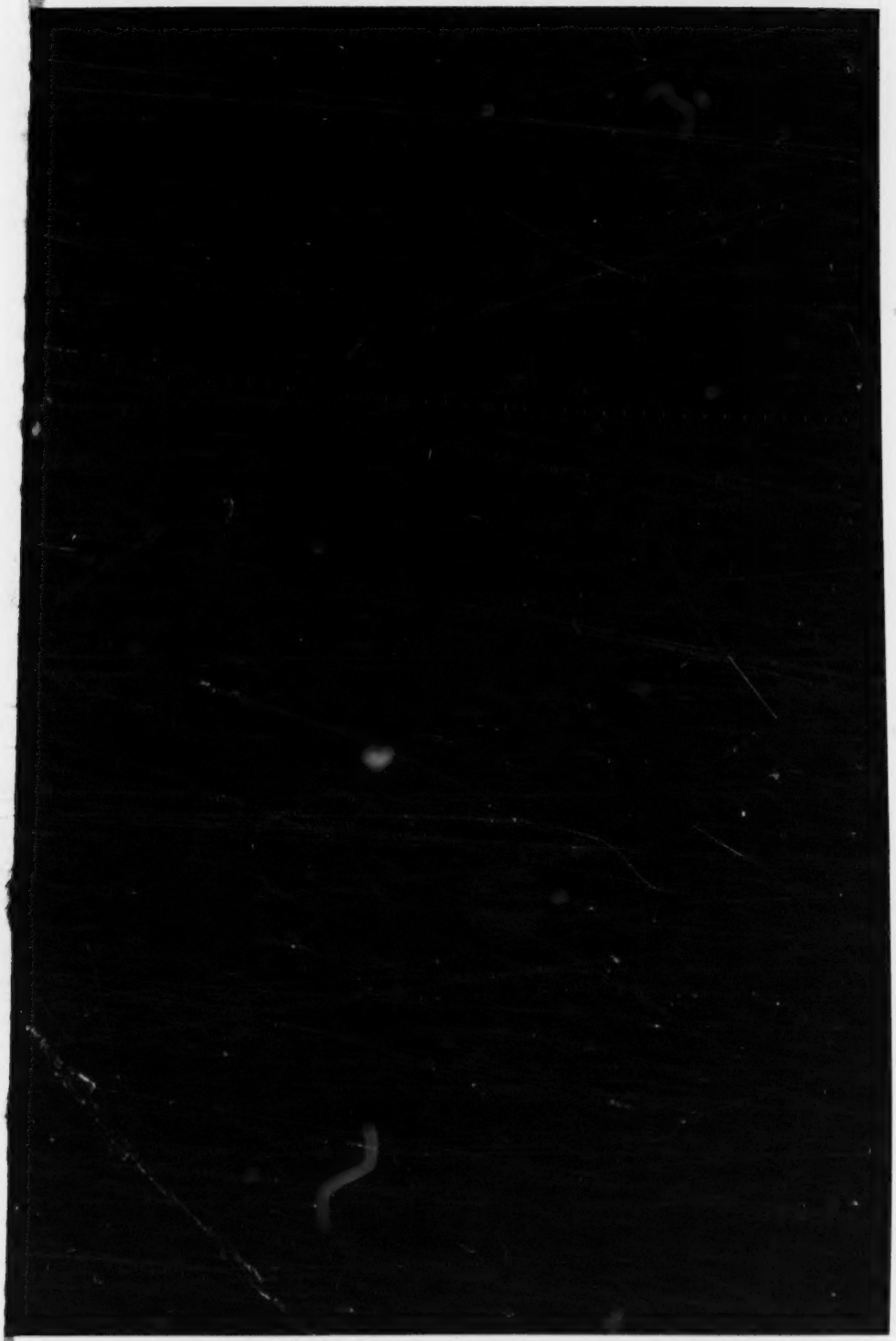
It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants their cost herein expended.

(s) Frances Jones Mills

FRANCES JONES MILLS, C.C.A.
By ....., D.C.

A copy—Attest:
Issued March 4, 1975



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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, and
BERT J. HEUSER - - - - - - *Petitioners*

v.

GEORGE BURTON, Director of Public Safety and
LOUISVILLE CIVIL SERVICE BOARD - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The Respondents, George Burton, Director of Public Safety, and Louisville Civil Service Board, respectfully pray that the writ of certiorari petitioned for in the above styled case be denied.

STATEMENT OF THE CASE

Respondents agree with Petitioners' Statement of the Case except for that which states that, "An appeal was taken to the Louisville Civil Service Board which refused to act on the matter and the lawsuit herein was commenced." It is the impression of Respondent that the Petitioner elected a remedy through the State Court rather than the Civil Service Board.

LACK OF JURISDICTION

The Respondent respectfully submits that this Honorable Court is without jurisdiction to grant a writ of certiorari. The Petitioners, Louisville Lodge No. 6, Fraternal Order of Police, and Bert J. Heuser invokes jurisdiction under 28 U.S.C. §1257(3). Such statute states: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is *drawn in question* or where the validity of a State statute is *drawn in question* on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is *specially set up or claimed* under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In Petitioners' Brief to the Court of Appeals of Kentucky it is stated: "Appellant wishes to emphasize that the constitutionality of KRS 90.220 or 95.015 is *not* being questioned, but rather that these statutes specifically indicate which activities civil service employees are precluded from engaging in; and had the legislature desired to prohibit civil service employees from being candidates in public elections they would have included such clause in KRS 90.220."

The Opinion of the Jefferson Circuit Court, Chancery Branch, Fourth Division, in deciding the case in favor of Respondents, states: "Suffice it to say that

constitutionality of the statutes at issue in this action have *not* been challenged by the plaintiff and, therefore, should *not* be decided by this court." (Page 23 of Petitioner's Petition for Certiorari.) And in the Opinion of the Court of Appeals of Kentucky affirming, it is stated: "The appellants do *not* in terms argue that KRS 90.220(2) is unconstitutional". (At page 26 of Petitioner's Petition for Certiorari.)

The following are a list of cases in which the Supreme Court has held lack of jurisdiction under 28 U.S.C. 1257(3) because the constitutionality of the statute in issue was not raised in the lower courts.

1. *Memphis Natural Gas Company* v. *Roy H. Beeler,* 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857 (1941) (at 315 U. S. 649 page 651).

"Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state Supreme Court to be in issue, we must dismiss the appeal for want of jurisdiction."

2. *Murdock, et al.* v. *The Mayor and Aldermen of Memphis, et al.,* 87 U. S. 583, 22 L. Ed. 429, 20 Wall 590 (1874).

This case discusses the original of 28 U.S.C. 1257(3) passed in 1867 entitled "An Act to Amend an Act to Establish the Judicial Courts of the United States". 14 Stat. at L., 365, at 22 L. Ed. 441.

"But we have not yet considered the most important part of the statute, namely, that which declares that it is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all.

Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been decided in the State Court. . . ."

3. *Levy* v. *Superior Court of the City and County of San Francisco,* 167 U. S. 175, 42 L. Ed. 126, 17 S. Ct. 769 (1896). Court dismissed writ of error for want of jurisdiction.

". . . he did not, in the State court, draw in question any statute of the state upon the ground that it was repugnant to the Constitution of the United States, nor specially set up or claim in that court any right, title, privilege, or immunity under the Constitution of the United States . . . If the plaintiff intended to claim that the statute in question was repugnant to the Constitution of the United States, he should have so declared." (at pages 126-127).

4. *Scudder* v. *New York,* 175 U. S. 32, 44 L. Ed. 62 (at 63-64), 20 S. Ct. 26 (1899).

"No mention of the Constitution of the United States or of any provision thereof, by the plaintiff in error, or by the Court, is to be found at any stage of the case while it was pending in the courts of the state of New York . . . In order to give this court jurisdiction of a writ of error to review a judgment which the highest court of a state has rendered in favor of the validity of a statute of or an authority exercised under a state, the validity of the statute or authority must have been "drawn in question . . . on the ground of their being repugnant to the Constitution, laws or treaties of the United States." When no such ground

has been presented . . . this court has no jurisdiction."

5. *Mellon* v. *O'Neil,* 275 U. S. 212, 72 L. Ed. 245 (1927) at U. S. 214.

"It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

6. *Republic Natural Gas Company* v. *State of Oklahoma,* 334 U. S. 62, 92 L. Ed. 1212, at page 122, 68 S. Ct. 972 (1947). Citing *Memphis Natural Gas Co.* v. *Beeler,* the court says: "Appellant, of course, has the burden of affirmatively establishing this court's jurisdiction."

7. *Edelman* v. *California,* 344 U. S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (1952) at page 391.

"It is clear that this court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

8. *Michigan Central R.R. Co.* v. *Michigan Southern R.R. Co.,* 60 U. S. 378, 19 How. 378, 15 L. Ed. 689 (1856) (at page 689).

"In order to give this court jurisdiction under the 25th section of the Judiciary Act, the record of the case must show by direct averment or necessary intendment, that one of the questions enumerated in that

section did arise, and was ~~divided~~ decided by the state court, as required."

9. *Jett Brothers Distilling Co.* v. *City of Carrollton,* 251 U. S. 1, 64 L. Ed. 421, 40 S. Ct. 255 (1919) (at page 423) (Ky. case).

"In order to give this court jurisdiction by writ of error, under amended §237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority, upon a claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention."

QUESTIONS PRESENTED

1. Whether Kentucky Revised Statutes 90.220(2) prohibits a police officer employed by a city of the first-class from becoming a partisan candidate for the office of Alderman on the Board of Aldermen of the City of Louisville?
2. Whether the actions of the City of Louisville Chief of Police in suspending the Petitioner, Bert J. Heuser, because he became a candidate for the office of Alderman was arbitrary, capricious, and a violation of his rights under the Constitution of the United States or under other laws?

Even if this Honorable Court had jurisdiction in the above styled case, the case of *U.S. Civil Service Commission* v. *National Association of Letter Carriers,* 413 U. S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880, would be controlling in this situation. In *U. S. Civil Service Commission* v. *National Association of Letter Carriers, supra,* there was in question that portion of the Hatch Act (codified in 5 U.S.C. §7324(a)(2)), which prohibits federal employees from taking "an active part in political management or in political campaigns". The provisions have been attacked on grounds of (1) infringement on First Amendment rights of federal employees and (2) vagueness and overbreadth.

In upholding the constitutionality of the Act from a First Amendment standpoint, the Court quotes from *Pickering* v. *Board of Education,* 391 U. S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). This Court has recognized a balancing test weighing the interests of the employer in regulating the political activities of its employees as against the individual rights of said employees.

> "The problem in any case is to arrive at a balance between the interest of the (employee) as a citizen, in commenting upon matters of public concern and the interest of the (government), as an employer, and promoting the efficiency of the public services it performs through its employees." 20 L. Ed. 2d 811, at 817.

Insofar as precisely where this balance should be struck, the Court does not, of course, set the boundaries between what is permissible regulation of activities and

what would be an impermissible infringement on the First Amendment rights of the citizen. The Court does, however, state:

> "Although Congress is free to strike a different balance than it has, if it so chose, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitation on partisan political activities now contained in the Hatch Act." 37 L. Ed. 2d 796, at 808.

We would thus appear to be presented with a two-faceted fact question of (1) whether the balance which has been struck by the General Assembly in KRS 90.220(2) "is sustainable by the obviously important interests sought to be served by the limitations", and (2) whether the Court of Appeals' decision in holding that the statute prohibits a Civil Service employee from campaigning for and holding office as well as the activities expressly prohibited, was a proper construction of the statute.

As to the latter question, it has been held a number of times that the Supreme Court will not question the construction given to a state statute by the highest state court. *Oklahoma Tax Commission* v. *Texas Company,* 336 U. S. 342, 93 L. Ed. 721, and 69 S. Ct. 561 (1948), *Great Northern Railway Company* v. *Sunburst Oil and Refining Co.,* 287 U. S. 358, 77 L. Ed. 358, —— S. Ct. ——, *Supreme Lodge, K.P.* v. *Meyer,* 265 U. S. 33, 68 L. Ed. 888, 44 S. Ct. 432 (1923). Therefore, unless the statute is held to violate the federal constitutional rights of an individual or group of individuals, the

Supreme Court will not strike down the construction of a state statute by the highest court of the state. Consequently, if the state statute here in question is found to be constitutional by the balancing test mentioned in the *Letter Carrier* case, then the Supreme Court must uphold the decision of the Court of Appeals. Neither the express wording of the statute in question nor the construction of the statute by the Kentucky courts infringe any more upon the rights of the individual employees than did the federal statute in the *Letter Carrier* case, the Hatch Act. There is, however, a fact question as to whether or not the Kentucky statute *does* infringe further upon the right of the employee than the Hatch Act, and the answer will depend upon the Supreme Court's comparison of the wording of the two statutes. The Kentucky Court of Appeals deals with this question in the final penultimate paragraphs of their opinion, and their conclusion is that the statute may "in plain and understandable language forbid a civil service employee from becoming a partisan candidate for, or for campaigning for, an elective public office." The Court of Appeals has thus construed the statute as being in compliance with the holding in the *Letter Carrier* case, and therefore constitutional.

In regard to the objection as to the vagueness or overbreadth of the Kentucky statute, the Kentucky Court of Appeals has stated:

> "This Court is of the opinion that the implication in KRS 90.220(2) of the prohibition against

candidacy is so obvious that the prohibition may be considered to be expressed in plain and understandable language within the requirements of the *Letter Carrier* case." 518 S. W. 2d 777, at 779.

CONCLUSION

It is obvious from the above cited cases concerning the court's jurisdiction and the case of *U. S. Civil Service Commission* v. *National Association of Letter Carriers, supra,* that this court is without jurisdiction and even if so, the law clearly favors the respondent in this case. Therefore it is respectfully submitted that this Honorable Court deny the writ of certiorari.

Respectfully submitted,

BURT J. DEUTSCH
Director of Law

JOHN V. HANLEY
Asst. Director of Law

MARTIN R. GLENN
Asst. Director of Law
200 City Hall
Louisville, Kentucky 40202

Counsel for Respondents